United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

209

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case Number 24,638

UNITED STATES OF AMERICA

Appellee

vs.

WILBUR A. WARREN

Appellant

APPEAL IN FORMA PAUPERIS FROM JUDGMENT OF CONVICTION
BY THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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STATEMENT OF QUESTIONS PRESENTED

1. Did the District Court err in denying appellant's Motion to Suppress evidence secured from his person when he was present upon premises at a time when police were executing a search warrant of the premises?

2. Can the arrest of the appellant be grounded on his mere presence upon premises where some "implements of a crime" are observed?

This case has not been before this Court for review before.

REFERENCES AND RULINGS

Appellant's pretrial Motion to Suppress Evidence was agreed and denied by the Trial Judge on February 9, 1970 (Tr. M.T.S. 22). This same Motion was renewed and overruled at trial (Tr. 53 - 54).

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA	)	
Appellee	)	
vs.	)	No. 24,638
WILBUR WARREN	)	
Appellant	)	

APPEAL IN FORMA PAUPERIS
FROM JUDGMENT OF CONVICTION BY THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

Jurisdictional Statement

Appellant, pursuant to Grand Jury indictment No. 2191-69, filed in open Court on December 16, 1969, was charged with violation of 26 U.S.C. 4704(a) (Possession of Narcotic Drugs not in Original Stamped Package) and 21 U.S.C. 174 (Receipt and Concealment of Narcotic Drugs, Knowing Same to Have Been Imported Contrary to Law).

On December 12, 1969, appellant was arraigned at which time he entered a plea of not guilty to both counts of the indictment. A Motion to Suppress Evidence was filed on January 26, 1970, and denied on February 9, 1970. On February 20, 1970, the appellant withdrew his plea of not guilty and pleaded guilty to Count One of

the indictment and thereafter, on March 17, 1970, this plea was vacated by Order of the Court.

On April 27, 1970, the appellant waived jury trial and the Court, sitting without a jury, found him guilty on Count One (26 U.S.C. 4704(a)) and not guilty of Count Two (21 U.S. (174)).

On August 11, 1970, the Court considered appellant to be an eligible offender as defined in Section 4252 of Title 18, U.S.C., and believing him to be an addict ordered him to be placed in the custody of the Attorney General, to determine if he is an addict and is likely to be rehabilitated by treatment. Thereafter the appellant was sent to the Drug Treatment Center, Federal Correctional Institute, Danbury, Connecticut.

Appellant filed notice of appeal on time and was granted leave to proceed upon appeal in forma pauperis. By Order issued on October 7, 1970, this Court appointed the undersigned to represent the individual appellant in this case.

Statement of Case

The Government charged the appellant with violation of 26 U.S.C. 4704 (a) (Possession of Narcotic Drugs Not in Original Stamped Package) and 21 U.S.C. 174 (Receipt and Concealment of Narcotic Drugs Knowing Same to Have Been Imported Contrary to Law). A pre-trial Motion to Suppress Evidence was denied. The appellant waived a jury trial and was tried by the Court on April 27, 1970, and was found guilty of Count One (26 U.S.C. 4704(a), Possession

of Narcotic Drugs Not in Original Stamped Package) and not guilty of Count Two (21 U.S.C. 174, Receipt and Concealment of Narcotic Drugs Knowing Same to Have Been Imported Contrary to Law).

In the course of the trial defense counsel renewed his Motion to Suppress evidence and the Court again denied the Motion.

The facts relevant to the issues are as follows:

The offense complained of occurred on September 15, 1969, at about 7:15 P.M. when Officer Henry Joseph Daley executed a search warrant on premises 315 1/2 "I" Street, S.E. (Def. Exhibit I). The warrant was issued pursuant to the affidavit of Officer Daley (Def. Exhibit I). On the aforementioned date, Officer Daley, in the company of approximately six other officers, knocked on the door, announced they were police officers, stated that they had a search warrant and requested that the door be opened (Tr. 9, 10). There was no response (Tr.10) and after waiting a period, varying from a short time, ten or fifteen seconds (Tr.10) to perhaps 20 seconds (Tr.20) the door was forced open and the police entered the premises (Tr.10). After alighting a flight of stairs to the second story, the officers went to the rear of the apartment and entered the kitchen (Tr.10) where the appellant, Wilbur Warren and one John Diggs, since deceased, were each standing with a small table between them (Tr.10) upon which there was a hypodermic syringe, needle, cover and two cord-type tourniquets (Tr.11)

Immediately Officer Daley advised both men in the room, "You are under arrest, you're both locked up" (Tr.11). The appellant

was searched by Officer Johnson (Tr.12) who found thirty-seven gelatin capsules of white powder (Tr.33) which later was determined to contain 6.4 per centum heroin. Officer Daley acknowledged that, prior to the search, he had no information relative this appellant (Tr.23), and that the premises which were the subject of the search were rented by Mr. Diggs (Tr.22).

Statutes Involved

Article IV, the Constitution of the United States -

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Federal Rules of Criminal Procedure, Rule 41,,(a), "Motion for Return of Property and to Suppress Evidence:"

> "A Person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Argument

1. The District Court erred in denying appellant's Motion to Suppress.

The thirty-seven gelatin capsules, containing heroin, found on appellant, were seized as a result of an illegal search.

Officer Henry J. Daley averred in his affidavit for a search warrant (Def. Exh. I) that he had reason to believe that certain property, heroin, etc., was being concealed on the premises known as 315 1/2 "I" Street, S.E., Washington, D.C., and secured a warrant to search the "entire premises". His affidavit further asserts the premises had been under surveillance and was occupied by John Diggs who made a prior sale of narcotics to a reliable informant. Neither the affidavit nor the search warrant refersto the appellant nor seeks authority to search parties on the premises.

There is no question but that the issuance of the warrant was valid. There can be little doubt but that it was intended only for the search of the premises. Since the Fourth Amendment protects against unreasonable search and seizures and Rule 41 of the Federal Rules of Criminal Procedure provides the framework within which the authorities must operate, it is essential that we examine the activities of the arresting officers.

As it was held, in U.S. v. DiRe, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948), the right to search an automobile does not necessarily mean the right to also search the occupants. Nor can

an arrest be justified on the ground that when an officer has a warrant to search for the seize property upon designated premises, he has the additional authority to arrest without a warrant. See United States of America v. Louis Festa, 192 F. Supp., 160 (1960). In that case a warrant was issued to search a gaming establishment, the defendant was present when the warrant was served. The Motion to Suppress items secured from him was granted because the Court said, "It is not the law that armed with a search warrant for a particular building an officer may 'search all persons found in it'."

In U.S. of America v. Haywood, 234 F. Supp. 245 (1963), the Court suppressed evidence secured as a result of a "pat search" of defendant's person where the police authorities only secured a warrant to search defendant's residence and quoted from Walker v. United States, 117 U.S. App. D.C. 151, 327 F. 2d. 597 (1963), Court denied, 377 U.S. 950, 84 S.Ct. 1635, 12 L. Ed. 2d. 500 (1965), wherein the Court said, "This (the court's approval of the search and seizure there) is not to say that the authority conferred by a warrant to search premises is co-terminous with that residing in a warrant to search the person." The Lower Court was of the opinion that Walker v. United States applied in this instance. However, I find the factual differences controlling.

In the Walker case, the bag (containing narcotics) was on the premises to be searched, in plain view of the officers, under circumstances making it not unreasonable to suppose that the objects of search might be in the container. But in the instant case, the

contraband was found on the person of the appellant, who was merely in the same room as the occupant of the premises.

In the Walker case, although the Court reiterated the principle that a warrant for the search of a place cannot be extended to search of person, in the absence of special circumstances, it rules that the warrant covered what was apparently in their hands. Significantly, the Court went on to say that had the bag been on the table or on the floor, it would have been covered by the warrant, but it did not infer or hold that the warrant would cover any such item secreted on a person.

It is apparent from recent decisions, such as Terry v. Ohio 392 U.S. 1, 88 S.Ct. 1963, 20 L. Ed. 2d. 889 (1968), that a search will comply with the Fourth Amendment's protective requirement only if its scope is no broader than necessary to accomplish legitimate governmental objectives. Therefore, any search, such as a "patting down" for protective purposes, which is reasonable at its inception, may violate the Fourth Amendment by virtue of its intolerable intensity and scope, and the scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible, U.S. v. Robinson U.S. Appl. D.C. 23,734, decided December 3, 1970.

But in the Sibron v. New York, 392, U.S. 40 (1968), the Court went further and held that, assuming arguendo the arresting officer had reason to suspect Sibron was armed, the actual search - a direct intrusion into the suspect's pockets rather than frisk -

would still have been constitutionally invalid because not "unreasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception - the protection of the officer....."

In view of the foregoing controlling law, as applied to the facts herein (since the appellant was merely present on the premises where a search warrant was being executed and there is no other evidence of his committing any crime), it was error to deny the Motion to Suppress any evidence seized from him, in violation of the fundamental protections of the Fourth Amendment of the Constitution as the result of an unlawful search.

2. The arrest of the appellant was illegal.

It is apparent that the search of the appellant cannot be justified under the authority incident to the execution of a search warrant upon premises in which he was present. It is now essential to examine the legality of the arrest on the basis of what was seen by the arresting officers after they entered the premises.

The record clearly demonstrates that the arrest for "Possession of Implements of a Crime"(Tr.23), of the appellant, occurred immediately after Officer Daley had entered the kitchen where he saw one John Diggs and the appellant and observed a hypodermic syringe, needle cover and two cord-type tourniquets (Tr.11). The Government attempts to justify the arrest, and the subsequent search on the grounds that the arresting officer had, "probable cause"

or "reasonable grounds" to believe that the appellant was then committing or, at least had committed, a felony. Once again mere presence is the key factor. If one can justify an arrest, without a warrant, on the basis of being present in an area where there are some 'implements of a crime", then the ultimate abuses of such rationale would be so far-reaching that any arrest could be justified, upon similar premises, in almost any instance. Is a household knife or hammer upon a table an implement of crime, justifying an arrest and subsequent search?

At the moment of arrest of the appellant there was no evidence indicating, in any way, that appellant had any possession, dominion, control, title or interest in the items upon the table. Nor does the evidence indicate that any illegal narcotic nor cooker were observed by the arresting officers at the time of the arrest (Tr.23). In Festa, supra, mere presence in a gambling establishment did not justify an arrest or subsequent search. In Sibron, supra, the Court said, "the inference that persons who talk to narcotic addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon a individual's personal security. Nothing resembling probable cause existed until after the search turned up the envelopes of heroin." Nothing justified the arrest of this appellant until after the search had disclosed the narcotics on the person of the appellant.

CONCLUSION

For the reason stated above, appellant prays that his convictions be reversed,or, alternatively, that it be reversed and remanded for further proceedings.

Respectfully submitted.

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Attorney for Appellant appointed
by this Court

CONCLUSION

For the reason stated above, appellant prays that his convictions be reversed,or, alternatively, that it be reversed and remanded for further proceedings.

Respectfully submitted.

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21 U.S.C. § 174 1
26 U.S.C. § 4704 (a) 1
22 D.C. Code § 1515 5
22 D.C. Code § 3601 4
33 D.C. Code § 402 (a) 4

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* Cases chiefly relied upon are marked by asterisks.

III

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Did the court err in upholding the seizure of thirty-seven capsules of heroin from appellant's pocket?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,638

UNITED STATES OF AMERICA, APPELLEE

v.

WILBUR A. WARREN, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a two-count indictment filed on December 16, 1969, appellant was charged with violations of the federal narcotics laws.[1] On April 27, 1970, appellant waived his right to trial by jury [2] and elected to be tried by the court. At the conclusion of that trial, Judge Oliver Gasch found him guilty on count one and not guilty on count two of the indictment. On October 15, 1970, appellant was sen-

[1] 26 U.S.C. § 4704 (a) and 21 U.S.C. § 174.

[2] Appellant was fully advised by his counsel and the court in this regard (Tr. 3-5).

tenced to serve not more than ten years under the Narcotic Addict Rehabilitation Act.[3] This appeal followed.

On February 9, 1970, Judge Gasch conducted a hearing on appellant's motion to suppress evidence. At that hearing the evidence established the following:

On September 12, 1969, a United States Magistrate issued a warrant to search the entire premises at 815½ I Street, Southeast, for heroin and any other illegal drugs, as well as syringes, tourniquets, cookers and any paraphernalia used in connection with the preparation of heroin for retail sale.[4] The affidavit in support of that warrant established that one John Diggs was in the business of selling heroin from that address.

On September 15 Henry Joseph Daley, a Metropolitan Police officer assigned to the Narcotics Squad, accompanied by other officers, went to 815½ I Street to execute the warrant. On arrival the police knocked loudly on the door and announced their authority and purpose. They received no response, and after ten to fifteen seconds they broke down the door and went immediately to the rear of the two-room apartment. As the officers entered the kitchen, Daley saw John Diggs on the left side of a small kitchen table; appellant was on the right side. On the table, one or two feet from appellant and about three feet from Diggs, were a hypodermic needle with a syringe and needle cover, and two cord tourniquets. Confronted with this scene, Daley immediately arrested both appellant and Diggs. A subsequent search of appellant's pockets revealed a cream-colored envelope containing thirty-seven gelatin capsules filled with a white powder (M. Tr. 7-24).[5]

Officer Daley was the only witness who testified at the suppression hearing. At the conclusion of that hearing Judge Gasch denied appellant's motion. During the sub-

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[3] 18 U.S.C. § 4253 (a).

[4] The search warrant and the affidavit in support thereof are part of the record on appeal.

[5] "M. Tr." refers to the transcript of the hearing on the motion to suppress evidence; "Tr." refers to the transcript of the trial.

sequent non-jury trial, Officer Daley testified to the events surrounding appellant's arrest and the search of his person which uncovered the thirty-seven capsules (Tr. 8-25).[6] James M. Moore, a chemist with the Bureau of Narcotics and Dangerous Drugs, testified that he had examined those capsules and determined that they contained heroin (Tr. 41-47).

Appellant presented no evidence on his own behalf.[7]

ARGUMENT

Appellant's arrest was proper, and therefore the search incident to that arrest was legal.

(M. Tr. 7-24; Tr. 8-25)

Appellant argues that the search warrant with which the police were armed did not confer on them the authority to search any persons found on the premises when they executed that warrant. In our view this Court need not reach that question,[8] for the circumstances with which the police were confronted upon entry provided a valid basis, independent of the warrant, to arrest appellant.

Appellant's argument that he was merely "present" ignores the facts of this case. In the first place, the police knew that the premises where appellant was found were

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[6] Officer William L. Johnson, who accompanied Daley and who actually searched appellant, also testified to the events involved in the heroin seizure (Tr. 26-33). He testified that there were no tax stamps to be found in appellant's possession (Tr. 40).

[7] At the close of the Government's case appellant's counsel again raised the suppression question. The court held that the heroin was properly seized and denied appellant's motion for judgment of acquittal (Tr. 53-54).

[8] *Cf. Walker* v. *United States*, 117 U.S. App. D.C. 15, 327 F.2d 597 (1963), *cert. denied*, 377 U.S. 956 (1964); *Clay* v. *United States*, 246 F.2d 298 (5th Cir.), *cert denied*, 355 U.S. 863 (1957); *Nicks* v. *United States*, D.C. Ct. App. No. 5333, decided February 5, 1971.

used to sell narcotics.[9] In the second place, appellant was not merely present; he was only a foot away from a hypodermic needle, syringe, needle holder and two cord tourniquets which were in plain view on a table next to which he stood. These items "are 'usually' or 'reasonably may' be employed in the administering of heroin which is a crime under D.C. Code 1967, § 33-402(a)," [10] and the police were clearly justified in concluding that the items were in appellant's possession.[11] Under those circumstances the police would have been remiss in their duty had they not arrested appellant for possessing the implements of a crime in violation of 22 D.C. Code § 3601.[12]

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[9] *See Hinton* v. *United States*, 137 U.S. App. D.C. 388, 391, 424 F.2d 876, 879 (1969); *Wyche* v. *United States*, 90 U.S. App. D.C. 67, 193 F.2d 703 (1951), *cert. denied*, 342 U.S. 943 (1952).

[10] *McKoy* v. *United States*, 263 A.2d 649, 650 (D.C. Ct. App. 1970). Appellant emphasizes that no "cooker" was found. That argument is not factually significant here since the kitchen presumably contained many items, such as spoons, which could be so used. It is also legally irrelevant since, under these circumstances at least, no "cooker" is required. *Ponce* v. *Craven*, 409 F.2d 621 (9th Cir. 1969), *cert. denied*, 397 U.S. 1012 (1970).

[11] *Garza* v. *United States*, 385 F.2d 899 (5th Cir. 1967); *United States* v. *Gulley*, 374 F.2d 55, 60 (6th Cir. 1967); *United States* v. *Jones*, 340 F.2d 913 (7th Cir. 1964); *Mack* v. *United States*, 326 F.2d 481 (8th Cir.), *cert. denied*, 377 U.S. 947 (1964); *United States* v. *Gregory*, 309 F.2d 536, 540 (2d Cir. 1962), *cert. denied*, 373 U.S. 953 (1963); *Bourg* v. *United States*, 286 F.2d 124 (5th Cir. 1960); *cf. Wilson* v. *United States*, 91 U.S. App. D.C. 135, 198 F.2d 299 (1952); *Brown* v. *United States*, 58 App. D.C. 311, 30 F.2d 474 (1929); *United States* v. *Waters*, 73 F. Supp. 72 (D.D.C. 1947), *cause certified*, 84 U.S. App. D.C. 127, 175 F.2d 340 (1948), *appeal dismissed*, 335 U.S. 869 (1949).

[12] *Jennings* v. *United States*, 101 U.S. App. D.C. 198, 247 F.2d 784 (1957); *Ponce* v. *Craven*, *supra* note 10; *Hollyfield* v. *United States*, 407 F.2d 1326 (9th Cir. 1969); *United States* v. *Devenere*, 332 F.2d 160 (2d Cir. 1964); *McKoy* v. *United States*, *supra* note 10; *McKoy* v. *United States*, 263 A.2d 645 (D.C. Ct. App. 1970); *Keith* v. *United States*, 232 A.2d 92 (D.C. Ct. App. 1967); *cf. Gibson* v. *United States*, 80 U.S. App. D.C. 81, 149 F.2d 381 (1945). Appellant's contention that this theory would support the arrest of one standing next to a hammer on a table is meritless in light of *Benton* v. *United States*, 98 U.S. App. D.C. 84, 232 F.2d 341 (1956).

In fact, the circumstances were sufficient to provide the police with probable cause to believe that appellant had heroin on his person.[13] Under either theory appellant's arrest was valid. Because the arrest was narcotics-related, a search of appellant's person in quest of narcotics was clearly justified.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
AXEL H. KLEIBOEMER,
ROBERT J. HIGGINS,
Assistant United States Attorneys.

[13] *Hinton* v. *United States*, *supra* note 9, 137 U.S. App. D.C. at 391, 424 F.2d at 879; *Washington* v. *United States*, 130 U.S. App. D.C. 144, 146, 397 F.2d 705, 707 (1968) (Leventhal, J., concurring); *Carrado* v. *United States*, 93 U.S. App. D.C. 183, 192, 210 F.2d 712, 721-722 (1953), *cert. denied*, 347 U.S. 1018 (1954); *Wyche* v. *United States*, *supra* note 9; *United States* v. *Watkins*, 369 F.2d 170 (7th Cir. 1966), *cert. denied*, 386 U.S. 960 (1967); *Gibson* v. *United States*, *supra* note 12; *Janney* v. *United States*, 206 F.2d 601, 604 (4th Cir. 1965). Alternatively, an arrest for presence in an illegal establishment (22 D.C. Code § 1515) would have been proper. *Jones* v. *United States*, 271 A.2d 559 (D.C. Ct. App. 1970).

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